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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, DANA L. STEWART, Adjutant General of Ohio, ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON, WILLIAM SLOCUM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

Counterstatement of the Case

Introductory Statement

While there are no misstatements of fact in Petitioners' brief, and it correctly limits itself to the facts of record, Respondents believe that an analysis of the contents and structure of the complaint is necessary for a full understanding of the legal issues raised by its dismissal. Accordingly, the arguments will be preceded by a short analysis of the allegations.

Summary of the Complaint

This action was brought under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, with jurisdiction based upon 28 U.S.C. §1343. Plaintiffs sued on behalf of a class of students identified as "all persons who are students of Kent State University." All the named plaintiffs were students at Kent State University and members of the student government.

In substance, the complaint alleges that, between May 1-4, 1970, certain demonstrations and disorders occurred in and around Kent State University and the city of Kent, Ohio, and that the original defendants, and the Ohio National Guard troops under their direction, responded to the demonstrations and disorders in such a way as to deprive "plaintiffs and other students" of rights, privileges and immunities secured by the United States Constitution.

It is easiest to understand the complaint if its structure is seen as encompassing: (1) wrongs or deprivations of rights, privileges or immunities, (2) practices, orders or other circumstances causing the wrongs or deprivations, and (3) a claim for declaratory and injunctive relief seeking to correct the practices, orders and circumstances causing the wrongs or deprivations. The claim for injunctive relief rests on the allegations, contained in Paragraph 11 of the complaint that:[1]

> The actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard under Defendants' super-

[1] References to the complaint will be made to pages of the Appendix filed by Petitioners and will be designated as "App. —."

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vision and direction creates a substantial threat of repetition of similar acts and continues to deprive plaintiffs and other students of rights, privileges, and immunities secured by the United States Constitution. App. 6.

The wrongs or deprivations, and correlative practices, orders, operating methods and circumstances are, in substance, alleged as follows:

I. The unnecessary interference with the rights of lawful assembly, speech and association and deprivations of life and liberty without due process of law caused by the presence of military troops on a campus (Paragraph 12(a), App. 6-7).

In substance, the complaint alleges facts in support of the theory that the presence of troops, in place of civilian police, in itself interferes with the First Amendment rights set forth above and creates an unnecessary risk of injury and death. The circumstances alleged to cause the wrongs is the "premature" use of troops to perform police functions in and around the Kent campus.[2]

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[2] This portion of the complaint was characterized by Judge Edwards in his opinion below as "an attack on the premature calling out of the Ohio National Guard by Governor Rhodes on May 1, 1970 . . ." Pet. 12 (The Court of Appeals' Opinion is attached to the Petition for a Writ of Certiorari in this case, but consecutively numbered, and, hereafter, references to the Opinion will be to pages of the petition as "Pet. —".) The complaint also alleged "a pattern throughout the State of Ohio of continued and premature use of Ohio National Guard troops to displace civilian authority far in excess of the National norm." App. 7. The Court of Appeals refused to authorize what it characterized as a "prior restraint upon the exercise of emergency power specifically committed by constitution to the executive branch of government," Pet. 13, and therefore affirmed the dismissal. Review of that portion of the Court of Appeals' decision was not sought primarily because it was not believed to foreclose judicial examination of the legitimacy of a

II. Deprivations of life and liberty without due process of law by unjustified killings and injuries by Ohio National Guard troops. Paragraph 12(b). App. 7-8.

The conditions alleged to be causally related to the deprivations include failure adequately to provide Ohio National Guard troops with specialized civilian disorder training or with adequate equipment to respond to civilian disorders with non-deadly force, causing troops to carry live bullets in their guns and failing to properly instruct troops as to the legal limits on their use of deadly force.[3]

Under this portion of the complaint, while the named plaintiffs were neither killed nor injured, it is alleged that continuation of the conditions "constitutes a real threat to plaintiffs and other students of further deprivations of life and liberty without due process of law." App. 7.

III. Beatings and detentions were conducted by Ohio National Guard troops without resort to civilian courts and processes, partially in response to lawful assemblies. These were alleged to deprive members of the class of students of liberty without due process of law, and, in addition, to interfere with rights of speech and assembly. Paragraph 12(c). App. 8.

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national guard call in situations when the troops are actually on a campus, including the question of whether the necessity for troops had been adequately investigated by the governor, as the district court had done in *Bright* v. *Nunn* (unreported) (E.D. Ky., 1970), affirmed 448 F.2d 245 (6th Cir. 1971).

[3] This portion of the complaint is premised in part on the view that, at least when there is no invasion or rebellion troops have no greater authority over civilians than police. See, e.g., *State* v. *Coit*, 8 Ohio Dec. 62 (C.P. 1897).

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It is alleged that the defendants permitted and caused the conduct resulting in the beatings and detentions.

IV. Ohio National Guard troops broke up lawful and peaceable meetings, demonstrations and assemblies depriving persons of rights secured by the First and Fourteenth Amendments to the Constitution. Paragraph 12(d). App. 8-9.

In contradistinction to the preceding claim, this paragraph raises, in substance, the contention that defendants "ordered" a policy of forbidding public assemblies while Ohio National Guard troops were present on the Kent State University campus and challenges the constitutional validity of that policy.

In a separate paragraph, the complaint alleges the existence of Section 2923.55 of the Ohio Revised Code, which purports to provide an immunity from civilian punishment to troops using deadly force in riots,[4] and seeks to raise the claim that it "prospectively" violates the Fourteenth Amendment.[5] It is alleged that Section 2923.55 combines

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[4] It provides, in pertinent part:

> . . . [m]embers of the organized militia . . . when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to Section 2923.51 of the Revised Code, are guiltless for killing, maiming or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court-martial for a military offense.

[5] Judge Edwards dealt separately with this portion of the complaint in his opinion for the Court of Appeals. He affirmed the district court's dismissal on the ground that, limited to the standard of "necessary and proper" use of lethal force, the statute was substantially equivalent to the common law. Pet. 22. His opinion, how-

with the other conditions discussed above to increase the risk of further injury and killing of students. App. 10.

The relief requested in the complaint is keyed to the orders, practices and conditions alleged in the complaint to have caused the deprivations of constitutional rights. In general, it can be summarized as seeking a declaration of the unconstitutionality of such orders, practices and conditions and an injunction enjoining the defendants from utilizing Ohio National Guard troops in the area of Kent State University unless the orders, practices and conditions have ceased to exist.

Proceedings Below

The defendants moved in the district court to dismiss the complaint on several grounds. One was that federal laws and regulations control training and supply of troops. It was contended that, as a result, a claim against the defendant state officer was not stated or, if it was, that the United States was an indispensable party. Another ground for dismissal was that the claim for relief against premature use of the Ohio National Guard would, if granted, lead to unwarranted interference with the State's execu-

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ever, explicitly permitted proof, if there was any, under the remanded portion of the case, that Section 2923.55 had been utilized to authorize unnecessary lethal force. *Ibid.* Since that position was contemplated as the heart of the retrospective aspect of plaintiffs' case, Respondents did not seek review of that portion of the Court of Appeals' decision.

Since the Court's decision, the Ohio General Assembly has enacted a comprehensive penal code revision bill and has removed Section 2923.55. Compare Am. H.B. 511, 109th Ohio Gen. Ass. (March, 1972) with Am. Sub. H.B. 511 (Senate Version), 109th Ohio Gen. Ass. (December, 1972) (enacted by Ohio Gen. Ass. December 13, 1972).

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tive power. Finally, it was contended that Section 2923.55 of the Ohio Revised Code was not unconstitutional.[6] App. 12-13.

The defendants' motion came before Judge Connell of the United States District Court for the Northern District of Ohio, Eastern Division, who dismissed it in whole without opinion. App. 14.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part. Judge Edwards, writing for the Court, separated the complaint into three parts for analysis. As to two of them—the allegation of premature use of militia in civilian disorders and the claim of unconstitutionality of Section 2923.55 of the Ohio Revised Code, he affirmed the dismissal on the ground that there could be no relief. The remainder of the complaint was held to state a claim which, if proved, would entitle the plaintiffs to some relief. Accordingly, its dismissal was reversed. Judge Celebrezze dissented from that portion of the Court of Appeals' decision.

The defendants petitioned this Court for a writ of certiorari to review that portion of the Court of Appeals' decision which reversed and remanded.[7] Plaintiffs below did not seek to have the partial dismissal reviewed.

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[6] Parenthetically, it was added that the Adjutant General was already seeking non-lethal riot control devices, but the motion did not make clear whether this was presented as an independent ground for relief.

[7] By this time, Governor Rhodes had been replaced by Governor Gilligan, and a new Adjutant General had been appointed for the Ohio National Guard. These names were substituted by Petitioners in their petition to this Court, presumably pursuant to Rule 25, Fed. R. Civ. P.

Introduction to Argument and to Summary of Argument

Petitioners have presented two questions in their brief. Their first claim is that the Political Question doctrine immunizes the training, equipment and orders of National Guard troops from judicial review. The second claim is that something called "Our Federalism" bars a federal court from interfering with the "legitimate activities of a state."

To the extent that Petitioners' second contention is understood as different from their political question contention, it appears to be a more general challenge to federal court injunction actions of the kind represented by the case at bar. Accordingly, Respondents will reverse the order of argument and deal, in Part One, with the general validity of the claims set forth in the complaint as a basis for declaratory and injunctive relief in a federal court and deal in Part Two with the question of whether placing the issues in the context of a civilian disorder in which the National Guard has been activated changes any of the results reached in Part One. While Petitioners have characterized this latter portion of their argument under the political question doctrine, it is believed that a second—and more serious—issue is raised by their position. That issue is whether rights, privileges and immunities secured by the United States Constitution against the civilian police power of a state are not to the same extent secured when its militia is activated to control civilian disorders not amounting to rebellion or invasion.

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Summary of Argument

As to Part One. The sole question before the Court is whether, if the facts alleged are proved, *some* relief is possible. A series of deprivations of constitutionally secured rights are alleged in the complaint to have been inflicted upon members of the class represented by Respondents. These deprivations include deprivations of life and liberty without due process of law, as well as the rights of peaceful assembly and association. Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 provides for redress of deprivations of constitutionally secured rights, privileges and immunities at equity and, under that act, injunctions have traditionally been given against state officials to prevent repetition of official misconduct. None of the traditional doctrines limiting the jurisdiction of federal district courts is applicable in actions such as this, seeking primarily to enjoin official conduct, rather than the enforcement of state laws. Nothing in the Court's opinion in *Younger* v. *Harris,* 401 U.S. 37 (1971) or its companion cases, or their subsequent applications closes the federal courts to actions such as this one.

Moreover, Respondents are proper parties to bring this action, in view of the allegations of risk of future constitutional deprivations directed at the entire class of Kent State University students, of which they are members, and of past deprivations caused to the same class. The case is not one of the assertion of another's rights. This suit is properly brought as a class action under Rule 23(b) of the Federal Rules of Civil Procedure.

As to Part Two. The political question doctrine serves the goal of identifying whether the judiciary or a coordi-

nate branch of the federal government ought to exercise final decision as to a particular question. While Congress may have some role to play in the training and arming of state militia, it is ultimately a judicial function to determine whether particular executive, including military, conduct has effected a deprivation of constitutional rights and to grant relief. There is no more of a textual commitment to another branch here than there is in any circumstance in which another branch of government, state or local, has primary operating responsibility for a particular governmental function and exercises it in a manner inconsistent with provisions of the Constitution. Nor is the argument of executive expertise any different here, in a military context, than it is in the numerous other contexts in which the Court has found the Constitution to require the granting of judicial relief.

Conduct of the military has not heretofore been thought to be immune from judicial review and redress at equity. Moreover, the fact that a governor decides that military, rather than civilian forces are appropriate to control a particular disorder does not change the legal relationship of the government to the governed under our constitutional system. Even in insurrection or invasion, only the writ of habeas corpus may be suspended, not the rights of citizens.

ARGUMENT

PART ONE

A. *Scope of Review*

This Court has found it necessary on several occasions, in the context of actions under the Civil Rights Act, to reiterate the long-standing rule that pleaded facts are to be treated as true when a simple motion to dismiss is made, and the action is not to be dismissed unless there is no possibility that relief can be granted. See e.g. *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley* v. *Gibson*, 355 U.S. 41 (1957). In this case, the district judge appears to have lost sight of elementary principles of civil procedure which favor the resolution of disputes after the development of a full factual record, so long as some relief can be anticipated in the event the allegations are proved. The Court has recently reviewed cases in similar contexts and has followed a uniform policy of vacating the dismissal and remanding for trial. See, e.g. *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Haines* v. *Kerner*, 404 U.S. 519 (1972).

The only occasion on which this policy has seriously been questioned in this Court was Justice Rehnquist's dissenting opinion in *Cruz* v. *Beto*, 405 U.S. 319, 323 (1972), in which the suggestion was made that the standard of *Conley* v. *Gibson*, 355 U.S. 41 (1957) ought not to be applied to claims of prisoners. The suggestion, however, was based upon the view that the possibility of leaving the prison for a Court hearing gave an inmate an incentive to file frivolous or fraudulent pleadings, 405 U.S. at 327. No reason has ever been put forth for departing from the *Conley* rule in cases like this one.

B. *Constitutional Deprivations*

Of the several deprivations of constitutional rights raised by the complaint, the Court of Appeals saw the most serious as the deprivation of life without due process of law effected by the unjustified killings of persons. The source for the now-settled view that an arbitrary and unjustified killing by state officials constitutes a deprivation of life without due process of law is *Screws* v. *United States,* 325 U.S. 91 (1945), a criminal case tried under the analogue to Section One of the Civil Rights Act of 1871 (presently 18 U.S.C. §242). The defendant was a sheriff who, having apprehended a person under charge of a criminal offense, proceeded to beat him to death. The Court held that the sheriff's misuse of power, coming, as it did, as a consequence of his being clothed with the authority of the state, was "under color of" state law. 325 U.S. at 107-111. See also *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Williams* v. *United States,* 341 U.S. 97, 99 (1951); *United States* v. *Classic,* 313 U.S. 299, 326 (1941). It then went on to conclude that one acting under color of state law may not, consistently with the due process clause of the Fourteenth Amendment, inflict punishment without the orderly process of trial.

In the years that followed *Screws,* particularly after the impetus added by the application of its state action theory to damage actions under 42 U.S.C. Section 1983 in *Monroe* v. *Pape,* 365 U.S. 167 (1961), the Court's decision in *Screws* has been the theoretical base for a growing body of cases in the lower courts recognizing that an arbitrary killing, or infliction of injury, by state officials, is a deprivation of rights secured by the Fourteenth Amendment. See e.g. *Howell* v. *Cataldi,* 464 F.2d 272 (3rd Cir. 1972); *Anderson* v. *Nosser,* 456 F.2d 835 (5th Cir. 1972); *Carter* v. *Carlson,*

447 F.2d 358 (D.C. Cir., 1971), *cert. granted in part sub nom., District of Columbia* v. *Carter,* 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir. 1970); *Stringer* v. *Dilger,* 313 F.2d 536 (10th Cir. 1963); *Brazier* v. *Cherry,* 293 F.2d 401 (5th Cir.), cert. denied 368 U.S. 921 (1961); *Jackson* v. *Duke,* 259 F.2d 3 (5th Cir. 1958). In some of the cases just cited, the basic *Screws* "due process" theory has been supplemented with theories based upon the Fourth Amendment[8] and the Eighth Amendment's Cruel and Unusual Punishment clause.[9] It has become well settled, however, under any of the theories that a constitutional "shield covers the individual's physical integrity [and] injuries arbitrarily inflicted by the police are constitutionally cognizable and remediable." *Jenkins* v. *Averett,* 424 F.2d at 1232 (Sobeloff, J.).

Moreover, unlike 18 U.S.C. Section 242, which punishes "willful" deprivations of constitutional rights, 42 U.S.C. Section 1983 contains no requirement of specific intent to deprive the victim of a constitutional right. *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961).[10] As a consequence of *Monroe,* several of the circuits have held the *Screws* theory applicable to state officials who did not intend to cause death or injury, and, on that basis, attach liability to supervisory persons, such as those involved in this action, for the negligent or reckless failure to prevent their subordinates from inflicting arbitrary or unjustified killing or injury. See, e.g.,

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[8] *See Jenkins* v. *Averett,* 424 F.2d 1228 (4th Cir. 1970).

[9] *See, e.g., Howell* v. *Cataldi,* 464 F.2d 272, 279-281 (3rd Cir. 1972); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir.), *cert. denied* 404 U.S. 866 (1971), *addendum* 456 F.2d 834 (5th Cir. 1972); *cf. Jackson* v. *Bishop,* 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.).

[10] *See also Allison* v. *Wilson,* 434 F.2d 646, 647 (9th Cir. 1970); *Puckett* v. *Cox,* 456 F.2d 233 (6th Cir. 1972).

Roberts v. *Williams*, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted in part sub nom. District of Columbia* v. *Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972). Thus the basic claim that the defendants named in this action are amenable to suit under 42 U.S.C. Section 1983 for the failure to eliminate practices, orders and conditions which unnecessarily caused the deaths and injuries by gunshot alleged in the complaint proceeds on well settled principles.[11]

A second claim arising under the theories set forth above is, in substance, the allegation that Ohio National Guard troops, in the course of their activities on May 1-4, 1970, detained persons on and around the Kent State University campus and beat some of them, inflicting summary punishment without arrest or trial. If true, such conduct falls under the principles discussed above. See *Anderson* v. *Nosser*, 456 F.2d 835, 840-841 (5th Cir. 1972) (*en banc*).[12]

A third claim set forth in the complaint is, in substance, that Ohio National Guard troops under the direction and

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[11] *Ibid. See also Roberts* v. *Williams*, 456 F.2d 819 (5th Cir.), *cert. denied* 404 U.S. 866 (1971), *addendum*, 456 F.2d 834 (5th Cir. 1972).

[12] There does not appear to be any basis for argument that either detention without arrest or beatings are not prohibited by the constitution. Certainly, as to the former, neither *Terry* v. *Ohio*, 392 U.S. 1 (1968) nor any other Fourth Amendment case would authorize detention without arrest. *See Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

Thus, the sole basis for a defense as to this aspect of the case is the contention that National Guard troops, called out in emergency or disorder, can do what the police cannot. That issue will be discussed in Part Two. For a case supporting the existence of such expanded power, *see Valdez* v. *Black*, 446 F.2d 1071 (10th Cir. 1971).

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supervision of defendants below, and in some instances pursuant to direct order, prevented persons from conducting peaceful and lawful assemblies and meetings, some of which were held to petition for redress of grievances connected with the presence of Ohio National Guard troops. As before, this aspect of the complaint follows well-tracked legal theory. It has long been settled that the First Amendment protects the right of peaceable assembly and the right to petition for redress of grievances from arbitrary denial and that such protection extends against state action. See, e.g., *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *DeJonge* v. *Oregon*, 299 U.S. 353 (1937); *United States* v. *Cruikshank*, 92 U.S. 542, 552-553 (1875). Moreover, there is no question that the use of physical force by government to prevent the occurrence of peaceable assemblies is a deprivation of the right.[13] See *Hague* v. *C.I.O.*, 307 U.S. 496 (1939). Cf. *Collins* v. *Hardyman*, 341 U.S. 651 (1951).

C. *Appropriateness of Relief by Injunction or Declaratory Judgment*

Textually, of course, Section One of the Civil Rights Act of 1871 forms a perfect basis for injunctive relief in cases such as this one. It provides, in pertinent part, that one responsible for deprivation of rights, privileges and immunities secured by the Constitution,

> . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[13] Here, as with the detentions and beatings, there can be no serious defense to the claim, if proved, other than the contention that the presence of the National Guard changes things, which is dealt with in Part Two.

Sections 1343(3) and (4) of Title 28 of the United States Code provide a correlative jurisdictional basis in the United States District Courts to "redress the deprivation" (Subsection (3)) and "to secure equitable or other relief" (Subsection (4)).[14]

The prototypical injunction action of the kind represented by this suit is *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), *affirming and modifying* 101 F.2d 774 (3rd Cir. 1939), *affirming and modifying C.I.O.* v. *Hague,* 25 F. Supp. 127 (D.N.J. 1938). The plaintiffs, various organizations and individuals engaged in a membership drive for a labor union, alleged that the police and municipal officials of Jersey City, New Jersey, pursuant to a plan to prevent their organizing activities in that city, had interfered with and refused to permit peaceable assemblies, the passing out of handbills and lawful picketing, and had physically deported agents of plaintiffs from the territory of Jersey City and harassed, violently molested and unlawfully searched the individual plaintiffs and others connected with them. 101 F.2d at 788. Upon finding that the allegations as to most of the claims were true, the district court issued a decree in favor of the plaintiffs. This Court approved the grant of injunctive relief against the conduct of the police, and their supervisors, in substantially the terms in which

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[14] In its original form, Section One of the Civil Rights Act of April 20, 1871 provided, in relevant part:

> . . . any person . . . shall . . . be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal review upon error and, other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, 1866 . . . ; and the other remedial laws of the United States which are in their nature applicable in such cases.

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it was issued,[15] thus recognizing the legitimacy of such action by a district court.

The lower federal courts, as a consequence of *Hague* v. *C.I.O.* and the fact that its principles have not been seriously challenged in this Court, have regularly exercised jurisdiction over actions seeking injunctive or declaratory relief based on claims that police or other agencies of state or local government were engaging or had engaged in deprivations of constitutionally secured rights. *See, e.g., Lewis* v. *Kugler,* 446 F.2d 1343, 1350 (3rd Cir. 1971); *Build of Buffalo, Inc.* v. *Sedita,* 441 F.2d 284, 289 (2nd Cir. 1971); *Schnell* v. *City of Chicago,* 407 F.2d 1084 (7th Cir. 1969); *Gomez* v. *Layton,* 394 F.2d 764, 766 (D.C. Cir. 1968); *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966); *Hairston* v. *Hutzler,* 334 F. Supp. 251 (W.D. Pa. 1971); *Wheeler* v. *Goodman,* 298 F. Supp. 935 (W.D.N.C. 1969); *Cottonreader* v. *Johnson,* 252 F. Supp. 492 (N.D. Ala. 1966); *Refoule* v. *Ellis,* 74 F. Supp. 336 (N.D. Ga. 1947).[16]

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[15] Actually, the Court broadened the injunction by modifying one portion of the decree. Separate opinions were filed by Justice Roberts, for himself and Justice Black; Justice Stone, for himself and Justice Reed; and Chief Justice Hughes, but all agreed with the basic legitimacy of injunctive relief under the circumstances. Justices Douglas and Frankfurter did not participate in the decision. Justice McReynolds was the only member of the Court who questioned the basic legitimacy of injunctive relief in the event of deprivation of constitutionally secured rights, writing,

> Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.

Obviously, the other members of the Court rejected this contention.

[16] In addition to the cases cited recognizing the appropriateness of federal district court injunctive relief to redress invasions by police conduct of personal rights secured by the Constitution, there has been continued use of similar remedies as to other aspects of

The cases just cited are a small sample of the great number of cases which recognize the basic principle that, certainly since the adoption of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871, the federal district courts have a primary role to play in protecting the constitutional rights of Americans against abuses caused by agencies of state and local government. Against this impressive array of authority, Petitioners apparently seek to persuade the Court that there is a "long-standing policy against interference by a federal court with the legitimate activities of a state." Pet. 2 (Second Question Presented). Unless they mean, by the word "legitimate," activities which *do not* effect a deprivation of constitutionally secured rights, privileges and immunities, the contrary is true; the cases cited, and innumerable others, establish a long-standing policy of "interference" by a federal court when state government interferes with federally secured rights.

There is a suggestion, however, both in the Petition for a Writ of Certiorari and Petitioners' brief on the merits, that recent decisions of this court, such as *Younger* v. *Harris*, 401 U.S. 37 (1971) (Petitioners' Brief, p. 12) and *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (Pet. 9), have changed the relationship of the federal district courts to activities of state government. Any such suggestion is unfounded.

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state government affecting the physical sanctity of human beings. *See, e.g., Wright* v. *McMann*, 460 F.2d 126 (2nd Cir. 1972); *Holt* v. *Sarver*, 442 F.2d 304 (8th Cir. 1971) *affirming* 309 F. Supp. 362 (E.D. Ark. 1970); *Sostre* v. *McGinnis*, 442 F.2d 178 (2nd Cir. 1971), *cert. denied sub nom. Oswald* v. *Sostre*, 405 U.S. 978 (1972); *Jones* v. *Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971) (physical mistreatment of prisoners).

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This Court has recently reaffirmed its earlier holdings that prior exhaustion of state remedies cannot be set up as a prerequisite to seeking injunctive relief under the Civil Rights Act. *See Wilwording* v. *Swenson*, 404 U.S. 249 (1971). *See also, McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961). The doctrine of abstention, which permits a district court to refrain from adjudicating a claim of deprivation of a constitutional right while the plaintiff, or others, seek relief in state court, has no applicability here; the doctrine has as its sole goal the avoidance of unnecessary constitutional decision-making in situations in which the claim of unconstitutionality involves a challenge to an ambiguous state statute and there is some reason to believe that by narrowing construction or other application of state law, state courts could abort the necessity for federal court decision. *See, e.g., Askew* v. *Hargrave*, 401 U.S. 476 (1971); *Reetz* v. *Bozanich*, 397 U.S. 82 (1970); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). The only portion of the complaint in this action to which the abstention doctrine might have arguable applicability is the claim of unconstitutionality of Section 2923.55 of the Ohio Revised Code, which has not been brought here for review.[17] In either case, the Court has steadfastly refused to authorize utilization of the abstention technique in cases involving personal liberties. *See, e.g., Wisconsin* v. *Constantineau*, 400 U.S. 433 (1970); *Zwickler* v. *Koota*, 389

[17] Abstention has always been thought of as conferring discretion on the district court to refrain from acting. Actually, in this case Judge Edwards appears to have put a narrowing construction on Section 2923.55 himself and, as a consequence, dismissed.

U.S. 241 (1967); *Harman* v. *Forssenius*, 380 U.S. 528 (1965); *Harrison* v. *NAACP*, 360 U.S. 167 (1959).[18]

Finally, the decision of the Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and its companion cases[19] do not affect the power of the district courts in connection with the issues raised in this case. There is in the complaint in this case neither a claim to enjoin a pending or threatened criminal proceeding nor a claim to prevent the future enforcement of a criminal statute alleged to be unconstitutional by injunction or declaratory judgment. *Cf. Boyle* v. *Landry*, 401 U.S. 77 (1971). The care which the Court took when it decided *Younger* and its companions to foreclose the extension of its doctrine[20] to areas other than those before the Court is evidenced by the concurring opinion of Justice Stewart, for himself and Justice Harlan. Justice Stewart wrote:

> In all of these cases, the Court deals only with the proper policy to be followed by a federal court when

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[18] For an extended discussion of the inapplicability of abstention to police misconduct suits, see the opinion of Judge Van Dusen in *Lewis* v. *Kugler*, 446 F.2d 1343, 1346-1348 (3rd Cir. 1971). *See also Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir. 1971).

[19] *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karaxelis*, 401 U.S. 216 (1971).

[20] Actually, it would be very difficult to argue that *Younger* made any fundamental changes in the relationship of the federal district courts to the states. The Court took great pains to point out that it was not making new doctrine. See 401 U.S. 45, 46, 52. Heavy reliance was placed upon cases like *Cameron* v. *Johnson*, 390 U.S. 611 (1968), *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), and *Watson* v. *Buck*, 313 U.S. 387 (1941), which predated most of the injunction actions cited in this brief and have not been treated as affecting district court power outside the area of pending criminal prosecutions in state court.

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> asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court. 401 U.S. 55.

Moreover, the rationale of the *Younger* line of cases is peculiarly inapplicable to the case at bar. The basic line of the Court's reasoning was that the burden of defending a criminal prosecution was not itself irreparable harm. One could expect to be vindicated against unconstitutional conduct by state criminal trial in the ordinary course of events, so that only when there was some additional injury, as when a series of prosecutions were commenced solely to harass, could there be the irreparable injury which was prerequisite to a federal court injunction.

In a case like the present one, however, the irreparable injury will be suffered unless the district court acts. There is no pending state proceeding in which vindication of the interests is possible. And any claim that federal court action must await such a proceeding is identical to the exhaustion of state remedies contention which this Court has so flatly rejected. Thus, Judge VanDusen appears to have been correct in rejecting similar claims for a panel of the Third Circuit in *Lewis* v. *Kugler*, 446 F.2d 1343 (3rd Cir. 1971). He wrote:

> They [the *Younger* decisions] are not applicable to situations where no prosecution is pending in state courts at the time a federal proceeding is begun, and they do not alter the abstention doctrine insofar as it relates to federal Civil Rights Act claims which do not seek relief that entails intervention in state criminal proceedings. 446 F.2d at 1347.

Finally, the other aspect of *Younger* and *Boyle* v. *Landry*, 401 U.S. 77 (1971), rejecting claims of persons who are neither threatened with imminent state prosecution nor were otherwise injured is even more remote from the case at hand. The injury of the plaintiffs in this action and the class they represent, as alleged in their complaint, was both concrete and great, and the maintenance, without judicial relief, of the conditions which caused those great injuries establishes the imminent presence of an identical risk.

D. *Standing*

The final issue which is implicit in Petitioners' challenge to the power of the district court to grant relief is the doctrine of standing to sue. It is conceded that if in fact the plaintiffs and the class they represent lack standing to sue, then the district court lacked power under Article III of the Constitution and the case was properly dismissed. That is not, however, the case.

Initially, it should be noted, this action is properly brought on behalf of the class of "all persons who are students of Kent State University" under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The crucial allegation, in connection with that rule in this case, is that the "defendants, and their agents, have acted, and threaten to act, toward the entire class in such a manner as to make appropriate an injunction and declaratory judgment on behalf of the entire class."[21] Complaint, Para. 4 (App.

[21] The case law on the subject of the preciseness of class definition appears to leave no room for contentions that the class in this action is not defined with sufficient precision. See e.g., *Yaffe* v. *Powers*, 40 U.S.L.W. 2495 (1st Cir. 1972); *Livingston* v. *Carmine*, 437 F.2d 1050 (5th Cir. 1971); *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th

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4). What the probabilities are of the injuries suffered by class members in the past being visited on the individual plaintiffs is not the issue; the precise question is whether the potentiality of harm to the class is of sufficient moment to create a live controversy. On that issue there can be little dispute.

The gist of the standing issue in any case is whether the party before the Court alleges a personal stake in the outcome of the controversy which is sufficient to assure concrete facts developed from adverse positions and thereby sharpen the issues for decision by the Court. *See Jenkins* v. *McKeithen,* 395 U.S. 411, 423 (1969); *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). As that aspect of doctrine of justiciability which has as its primary goal the avoidance of advisory opinions on abstract questions of law, the standing concept requires "injury" in the sense of exposure to harm, to assure that the litigation will not be purely a dispute over matters of policy or interpretation of constitutional language.

Viewed in that light, the personal stake of the individual plaintiffs, and the plaintiff class, is more than sufficient to satisfy the most restrictive notions of standing. This is not a case in which injury, if there is any, is in the future and lightly speculative, *cf., Davis* v. *Ichord,* 442 F.2d 1207 (D.C. Cir. 1970), nor is it a case in which the injury arises solely from reactions of the plaintiffs to governmental conduct otherwise not itself threatening to their interests,

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Cir. 1969); *Hughes* v. *Rizzo,* 282 F. Supp. 881 (E.D. Pa. 1968); *Morgan* v. *Hayth,* —— F. Supp. —— (N.D.O., E.D. No. C. 70-691, June 2, 1972) (unreported to date) (class of Kent State University dormitory residents).

as the Court characterized the issue in *Laird* v. *Tatum*, 408 U.S. 1 (1972). Rather, substantial physical injuries have been suffered by members of the plaintiff class in the past, both in the form of physical harm and in the form of governmental interference with conduct by physical force. Under the allegations of the complaint, the conditions causing the harm remain and thus the risk of harm is identical to the risk preceding the prior infliction of harm. *Cf. Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966) (past illegal searches of class members supporting injunction against future illegal searches).

Nor is there any basis for arguing that the fact that the individual plaintiffs are not the ones who have been shot deprives them of standing. This is an injunction action, aimed at the prevention of future harm. Cf. *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). Any Kent State University student is as much exposed to future shooting as are those who have been shot in the past. Certainly, the dead are not the appropriate parties to seek prospective relief.

In several recent cases, the Court has recognized that, in injunction actions, it is not past harm which confers standing, but rather the exposure to future harm. Thus, in *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969), the plaintiff sought declaratory and injunctive relief against a Louisiana statute which established a Labor Management Commission of Inquiry which he alleged was, in substance, a device aimed at public condemnation of labor union members without criminal trial. 395 U.S. at 419. Part of the claim of unconstitutionality was based upon the claim that procedural rights, such as the right to counsel, were not afforded to persons compelled to appear before the commission. The plaintiff had not yet been called to testify,

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and his standing to complain was challenged before this Court. Justice Marshall, writing the plurality opinion, found sufficient interest on the part of the plaintiff based upon the allegations that, since the acts of the defendants were designed to injure him, his interest in his reputation and future economic well-being guaranteed sufficient adversariness. 395 U.S. at 423-424.[22] Even the dissenting opinion of Justice Harlan[23] tends to support the standing of respondents here. It was based on the view that the plaintiff had failed to allege any way in which the allegedly unconstitutional procedural priorness of the Louisiana act had injured *anyone* in the past, 395 U.S. at 435, or threatened to injure the plaintiff, 395 U.S. at 437. Neither allegation is missing in the present case.

Of similar import is *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), in which this Court last term held that the Sierra Club, which brought what it characterized as a "public action" challenging an administrative determination of the Department of the Interior respecting the Mineral King Project, lacked standing to sue. The majority opinion goes to pains to point out that, had the complaint alleged that the Club, or its members, would be affected in any way in their future activities as a consequence of the Disney Development, there would be standing. The Court has recently validated this position in *Trafficante* v. *Metropolitan Life Insurance Co.,* 41 U.S.L.W. 4071 (Dec. 7, 1972).

Thus, by comparison to recent decisions of the Court, this is an easy case for standing. There are adversariness

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[22] Separate concurrences were filed by Justices Douglas and Black based on the merits of the case. Neither appeared to disagree with the majority's approach to standing.

[23] The dissent was joined by Justices Stewart and White.

and a genuine personal stake is alleged as to the plaintiffs. As to both the plaintiffs and the class represented, this is not one of those cases in which, although there may be a constitutional right involved, it only inures to the benefit of a class of which the party before the Court, because of a different status, is not a member. Cf. *Tileston* v. *Ullman*, 318 U.S. 44 (1943). Nor is it a case in which there is held to be no legally cognizable injury, and hence no standing, because the Court concludes that the conduct complained of does not, in itself, effect a deprivation of constitutionally secured rights. See *Laird* v. *Tatum*, 408 U.S. 1 (1972).[24] On the contrary, the parties before the court raising the issues they raise make out a perfect case of standing.

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[24] The holding of *Laird* that there is no standing flows from the Court's conclusion that there is *no injury*. Because of the peculiar nature of the injury alleged, however, the *no injury* conclusion really flows from the conclusion that there is *no right*, i.e., that the conduct complained of is not unlawful. All of the injuries alleged in *Laird*, including the alleged "chill" of rights of expression and association, ultimately had as their source an injury to the claim of privacy of the plaintiff, and others. But the claim of privacy asserted is essentially psychic or emotional despair at the inability to control others' possession and use of information about one's self, a claim generally regarded as not itself rising to the level of a right that can be subject to legal injury. Comparison of *Laird* to cases in which interference with the claim to privacy has been afforded recognition, see, e.g., *Katz* v. *United States*, 389 U.S. 347 (1967) exposes the fact that it is not the claimed emotional injury which is different but simply the defendant's conduct. Thus, in post-*Laird* privacy claims, the issue of standing turns solely on whether the conduct alleged to have occurred was in fact unlawful, a point not in issue in the present case.

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PART TWO

A. *The Political Question Doctrine*

Analysis of the "Political Question" contention of Petitioners ought to begin by noting certain inconsistencies in the arguments set forth in support of their position. It appears that Petitioners recognize that the political question doctrine is concerned solely with ascertaining which of the coordinate branches of the federal government has the ultimate authority to finally decide a particular question. Thus, they do not appear to question the Court's holding in *Baker* v. *Carr*, 369 U.S. 186 (1962) that " . . . it is the relationship between the judiciary and coordinate branches of the federal government, and not the federal judiciary's relationship to the states, which gives rise to the Political Question." 369 U.S. at 210. The claim is that final power over national guards rests in the hands of the Congress.

Nevertheless, a substantial portion of Petitioners' argument appears to be that the executive branch, and in particular the state executive, has greater expertise in how to run a militia than a court. See, e.g., Petitioners' brief at 10-11, Pet. 6-7. The "executive expertise" argument would seem to have little relevance to whether the Court or Congress has final authority over the question before the Court.

In considering justiciability, it is the question raised for resolution and not the context in which it is raised which determines whether it is justiciable. For example, *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849) was a simple trespass action for money damages. Crucial to the decision of the case was whether the Charter Government of Rhode Island was in violation of the Republican Guarantee Clause of the

United States Constitution. Since resolution of that question was referred to the Congress (via the seating of Senators) and President (in deciding whether to give aid in rebellion) the Court found it non-justiciable. If the question of whether the United States is at war with a foreign government is non-justiciable in an action to enjoin aid to that government, it is likewise non-justiciable if it becomes relevant in an action for money damages between private parties.[25] Similarly, if the issues raised by the complaint in this case are non-justiciable in an injunction action, they are likewise non-justiciable in an action for money damages arising from the same claim.

The precise claims before the Court, however, are not non-justiciable. They are simply whether past conduct of the Ohio National Guard has effected a deprivation of life and liberty without due process of law and a deprivation of the rights of peaceable assembly and association. Those questions are highly judicial in nature. There is no evidence of a textual commitment of that review function to Congress. Article I, Section 8 of the Constitution authorizes the Congress to provide for organizing, arming and disciplining the militia. As such, it provides a basis for the Congress to legislate respecting the militia. It has never been treated, however, as precluding civilian courts from inquiring into the legality of action taken by the militia toward civilians. See, e.g., *Sterling* v. *Constantin*, 287 U.S. 378 (1932); *Mitchell* v. *Clark*, 110 U.S. 633 (1884). Cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1967); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

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[25] The considerations behind some of these issues are dealt with at length in Justice Harlan's opinion in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

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To say that the power of Congress to legislate respecting a particular subject matter deprives this Court of jurisdiction to review in that subject area would seem to require a rewriting of constitutional history at least as far back as *Marbury* v. *Madison,* 1 Cranch 137 (1804). There is nothing in Article I of the Constitution to suggest the limitation on judicial power sought by Petitioners, and there is nothing in Title 32 of the United States Code, covering the National Guard, to suggest that Congress has purported to assume such power.

So far as other aspects of the traditional political question formulation are concerned, there is even less basis for treating the question as non-justiciable. The claims presented to the Court are peculiarly susceptible of judicial resolution. The interference with peaceable assembly claim is not dissimilar to the claims decided by the Court in *Hague* v. *C.I.O.,* 307 U.S. 496 (1939), and aspects of the summary punishment by beating and detention claim are not much unlike the claim decided in *Screws* v. *United States,* 325 U.S. 91 (1945). The main issue framed by Judge Edwards for the court of appeals—whether the training, weapons and orders of the Ohio National Guard make inevitable the unnecessary use of lethal force in civilian disorder—is likewise peculiarly justiciable. The question ultimately breaks down into two subsidiary ones: whether the Ohio National Guard did in fact use *unnecessary* deadly force at Kent State University on May 4, 1970, and whether the use of such force was a consequence of a deviation, perhaps a gross deviation, from the standard of care for safety of civilians appropriately followed in civilian disorders. The first question is simply a matter of recreating the past after taking testimony, for which

courts are traditionally used. The second is primarily a matter of fixing the appropriate standards of care, perhaps with the aid of experts, a task which courts likewise perform on a daily basis.

Finally, Petitioners' argument that a court lacks the expertise to examine Ohio National Guard conduct, and to fix relief, is one which is regularly raised when the state executive branch is brought before the court and regularly rejected as foreclosing justiciability. See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (educators' expertise); *Baker* v. *Carr*, 369 U.S. 186 (1962) (expertise of local political figures); *Haines* v. *Kerner*, 404 U.S. 519 (1972) (expertise of prison officials). This is not to say, of course, that a district court cannot take into account its own capacities and the nature of the subject matter in framing a decree. Respondents have never suggested that there is a fixed form in which relief must be given, nor did Judge Edwards, in appending the F.B.I. guidelines for riot control to his opinion, Pet. 22, suggest that they were the only form in which a decree could be given. See Pet. 20. Indeed, as to some claims, a district judge might conclude that a declaratory judgment gave sufficient relief.

It would be rather far-fetched to believe that a court, finding past deprivations of constitutionally secured rights by troops, either would or could fashion a decree which, as Petitioners suggest (Petitioners' Brief, p. 10), would disable troops to protect themselves, to protect property and the safety of persons or to restore order in disturbances. The suggestion is a particularly weak basis for a doctrine of non-justiciability.

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B. *Civilian Review of National Guard Conduct*

Ultimately, the claim of non-justiciability must rest on a simple proposition about constitutional government in the United States. That proposition is that a gubernatorial decision to use the militia in an emergency fundamentally changes the relationship of the judiciary to the state executive branch and that any action taken by a governor or the troops under his command is not subject to judicial review. It seems to have behind it the authority of Justice Holmes, who in broad dictum in *Moyer* v. *Peabody*, 212 U.S. 78 (1909) set forth the view that a governor could do anything he pleased during a state of insurrection to bring it to an end. That view of the Constitution, however, was expressly repudiated by the Court in *Sterling* v. *Constantin*, 287 U.S. 378 (1932)[26] and is inconsistent both with the text of the Constitution and the traditional understanding of the role of the Courts in reviewing the actions of the military toward civilians.[27]

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[26] Judge Celebrezze, in his dissenting opinion in the Court of Appeals, seems to read *Sterling* as foreclosing judicial review of anything other than whether the governor was in good faith in deciding whether to use troops. Pet. 31-32. Fundamentally, however, his position suffers from a confusion between judicial review and the appropriateness of a particular kind of injunction. Thus, he suggests that "an after the fact review of National Guard conduct which has allegedly deprived persons of their constitutional rights" can be undertaken by a federal court, but not an action seeking future relief. Pet. 32. *Moyer*, however, was a damage action for an allegedly unlawful detention. If the decision to use troops and how to use troops is unreviewable, then the form of the action is not relevant and, if it is reviewable, then any legitimate remedy authorized to the court would seem possible.

[27] For an extended discussion of some of the cases, including the Court of Appeals' opinion in this case, see N. Waranoff, Federal Judicial Control of the National Guard, 52 Boston Univ. L. Rev. 1 (1972).

Examination of the text of the Constitution reveals no mention of the concept of martial law and only one mention of the concept of suspension of constitutional rights. Importantly, that mention is in the negative:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it. U.S. Const. Art. I, Sec. 9, Clause 2.

There is no historical evidence that, at the time of its adoption, the Habeas Corpus clause was thought of as authorizing a general suspension of rights. Nor does the language of the clause suggest any more than that the courts can be closed during rebellion or invasion.[28] Moreover, even if suspension of rights were authorized, the limitation to rebellion or invasion could not be made to cover the allegations of this case.[29]

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[28] An illustrative case in this connection is *Bishop* v. *Vandercock*, 228 Mich. 299, 200 N.W. 278 (1924), a damage action for personal injuries negligently caused by troops called to duty by the Governor of Michigan. The court refused to foreclose review of troop conduct under a statute affording privilege "from prosecution, except by direct order of the governor for any acts alleged to have been committed while on such service." In order to save its constitutionality, the court read the statute as staying prosecution of actions against activated militiamen, in the absence of gubernatorial direction, until after the emergency. See also *O'Shea* v. *Stafford*, 122 La. 444, 47 So. 764 (1908).

[29] The complaint refers to the events in question as "certain disorders . . . [and] demonstrations . . ." Para. 10. App. 5. There is no suggestion before the Court that a rebellion existed at any time during May 1-4, 1970. Indeed, although it is beyond the record in this case, the only suggestion that there was even a riot at the crucial times of Ohio National Guard action at Kent was a Special Grand Jury report issued by a Portage County, Ohio Grand Jury on October 16, 1970, which was ultimately found to be unlawful and ordered destroyed in *Hammond* v. *Brown*, 323 F. Supp. 326 (N.D. Ohio), affirmed, 450 F.2d 480 (6th Cir. 1971).

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The pre-Civil War understanding of the suspension issue culminated in the Court's decision in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866), holding that a civilian could not be tried by a military tribunal in Indiana. The Court characterized the suggestion that a military commander had the power to suspend civil rights and their remedies for civilians as "irreconcilable" with civil liberty and rejected it outright, writing:

> Not one of [the Constitution's] safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus. 71 U.S. (4 Wall.) at 124-125.

That the Court's deviation from the *Ex parte Milligan* decision in *Moyer* v. *Peabody,* 212 U.S. 78 (1909) was only temporary is evidenced by the way in which Chief Justice Hughes' opinion for a unanimous Court in *Sterling* v. *Constantin,* 287 U.S. 378 (1932) mirrors the *Milligan* reasoning. He rejected the claim of omnipotence of the state executive after a proclamation of insurrection, writing:

> There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding . . . 287 U.S. 398.

Finally, in rejecting the claim that civilians in Hawaii during World War II could be tried in military courts without being afforded such constitutional rights as a jury trial, the Court seems to have conclusively laid to rest the

notion that emergency warrants suspension. *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). *Duncan* must be read as rejecting the notion that there is absolute power in the executive during an emergency.

Moreover, the conclusion, as expressed in the cases just discussed, that a gubernatorial determination of emergency is reviewable is identical to holding that conduct pursuant to that determination is reviewable. A governor's order to have somebody shot in the course of a civilian disorder would be reviewable to the same extent as an order suspending the production of oil, and it is the validity of the latter, not the abstract question of "insurrection" which was in issue in *Sterling* v. *Constantin*, 287 U.S. 378 (1932). Moreover, as was pointed out in Part One of this brief, an order to shoot somebody is not different, from a constitutional point of view, from a shooting by troops pursuant to orders which inadequately consider the risk of unjustified shooting; direct order to break up peaceable assembly is not different in kind from an order to troops permitting them to achieve the same end.

Finally, an action for injunction, as in *Sterling*, or declaratory judgment is not different in kind from an action for damages with respect to the subject matter of judicial review of National Guard conduct. It has earlier been shown that recognizing the injunction power is not tantamount to judicial takeover of the executive.[30] As in other contexts, the injunction power can serve as a useful alter-

[30] Nor is it tantamount to insistence that military troops in an emergency are limited to the powers of police in normal times. Common law rules would, as Judge Edwards pointed out, permit certain conduct directed at rioters that is, not normally permissible. Rights, such as the right to assemble are subject to regulations, properly drawn, which take emergency into account.

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native to actions at law, when the latter cannot prevent irreparable harm, and may, in appropriate cases, avoid injuries and avoid fruitless *post hoc* inquiries into the good or bad faith of government officials.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed, and this case should be remanded to the district court for a continuation of proceedings on those portions of the complaint which were upheld by the Court of Appeals.

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